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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Petitioners/Cross-Respondents,

—v.—

WALTER LEE,

Respondent/Cross-Petitioner.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The New York Civil Liberties Union is one of its state affiliates.

Throughout its 70 year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment. The ACLU has, therefore, appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*. Because this case raises an important First Amendment issue of organizational concern to the ACLU, we respectfully submit this brief as *amici curiae* for the Court's consideration.

## STATEMENT OF THE CASE

The International Society for Krishna Consciousness (ISKCON) is a not-for-profit religious corporation whose members perform a religious ritual known as "sankirtan," which involves "going into public places, disseminating religious literature and soliciting funds to support the religion." *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 577 (2d Cir. 1991). The religious *bona fides* of this practice are not at issue in this case. What is at issue is plaintiffs' right to distribute religious literature and solicit contributions at the three major airports serving New York City.[2] These terminals

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] As Judge Irving Kaufman has explained, to ban these activities prevents ISKCON's members "from fulfilling a central duty of their faith, removing the 'theological heart' of the religion." *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981).

have much the same character as many downtowns. For example, the lobby of one building includes "two restaurants, two snack stands, a bar, a postal substation and postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, two currency exchange facilities, a dental office, and an area for the display of art exhibits." *Id.* at 578.

After fifteen years of litigation, the issues in dispute have been significantly narrowed. Defendant is willing to allow solicitation on the sidewalks outside the terminal buildings, while plaintiffs' claims relating to leased areas of the airport (such as the gates) have been settled.[3] In the unleased areas, defendant's regulations prohibit the sale of merchandise, distribution of literature, or solicitation of funds, if those activities are "conducted by a person to or with passers-by in a continuous or repetitive manner."[4]

This restriction of plaintiffs' First Amendment rights was struck down in its entirety by the district court. 721 F.Supp. 572 (S.D.N.Y. 1989). A divided panel of the Second Circuit affirmed in part and reversed in part, holding that solicitation could be banned but the distribution of literature could not. In reaching this split decision, the court of appeals concluded that an airport terminal is not a public forum, 925 F.2d at 580, although conceding that the "well-established" authority in other circuits is to the contrary. *Id.* Its decision rested on the view that *United States v. Kokinda*, __ U.S. ___, 110 S.Ct. 3115 (1990), had "altered public forum analysis," 925 F.2d at 580.

On January 10, 1992, this Court granted plaintiffs' petition for *certiorari* and defendant's cross-petition.

[3] Most of the space at New York's three metropolitan airports is leased to commercial airlines. The unleased areas are controlled by the Port Authority itself and include the International Arrival Building at Kennedy Airport, the Central Terminal Building at LaGuardia Airport, and the North Terminal Building at Newark Airport. 925 F.2d at 578.

[4] Although the point has not been raised in this case, *amici* believe that that "repetitive manner" standard is unconstitutionally vague.



## SUMMARY OF ARGUMENT

The majority below struggled to follow the test first announced by this Court in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Perry* created a tripartite framework for evaluating regulations of speech on government property. Under *Perry*, the degree of judicial scrutiny depends on whether the property in question is: (1) a "traditional" public forum such as a park; (2) a "designated" forum that has been opened to the public for expressive activity; or (3) a "nonpublic" forum, which includes all other government property.

*Amici* believe that the court of appeals reached the wrong result even under *Perry*. More fundamentally, however, we believe that *Perry* has been undermined by later decisions and should now be abandoned. Indeed, it is a sufficient comment on the difficulty of following *Perry* that this case has already involved more than fifteen years of litigation.

*Perry* has three basic flaws. First, the divisions between the categories have proved elusive, as the present case illustrates. Second, the *Perry* test lacks any foundation in the language, original understanding, or purposes of the First Amendment. Third, the test has proved confusing and mechanistic. It focuses attention on formalistic classification rather than on the strength of the government's regulatory interest.

Because of these inadequacies, *amici* respectfully submit that *Perry* should be reexamined. We have serious doubts that content-based prohibitions can ever be upheld. *See Simon & Schuster v. Members of the New*

*York State Crime Victims Board*, __ U.S. __, 60 U.S.L.W. 4029, 4034-35 (Dec. 10, 1991)(Kennedy, J., concurring). At a minimum, however, "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981). More specifically, the government should be required to show that the expressive activity it seeks to ban is "basically incompatible with the normal activity of [the] particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). For example, a regulation of speech on school property should only be justified by the need to avoid disruption of the educational process. *See Tinker v. Des Moines School District*, 393 U.S. 503 (1969). Such an analysis, we submit, is no more than commonsense.

The airport regulation at issue in this case cannot survive this functional analysis or any other serious First Amendment scrutiny. The court of appeals upheld the ban on solicitation solely on the basis of pedestrian congestion. 925 F.2d at 582. As Judge Oakes pointed out in dissent, however, "public streets and sidewalks no less than airport terminals are subject to tremendous traffic problems all over the New York metropolitan area." *Id.* at 586. No one would suggest that crowding alone would justify a ban on solicitations and leafletting in downtown New York, yet defendant's regulations are not linked to any distinguishing attribute of airport terminals. Thus, the regulations violate the First Amendment.



## ARGUMENT

### I. THE *PERRY* TEST, AS CONSTRUED BY THIS COURT AND OTHER COURTS, IS INCONSISTENT WITH THE ORIGINAL PREMISES OF THE PUBLIC FORUM DOCTRINE, AND HAS ALREADY BEEN ERODED BY LATER CASES

Public forum doctrine has been sharply criticized by members of this Court,[5] other federal judges,[6] and numerous legal scholars.[7] Just two years ago, four Justices joined in an opinion questioning whether public forum doctrine "serves to obfuscate rather than clarify the issues at hand." *United States v. Kokinda*, 110 S.Ct. at 3127 (Brennan, J., dissenting). The present case highlights the wisdom of that observation and provides the opportunity to reappraise the continued viability of the

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[5] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985)(Blackmun, J., joined by Brennan, J., dissenting); *id.* at 833 (Stevens, J.)(expressing skepticism about the public forum doctrine); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976)(Brennan, J., dissenting).

[6] *See, e.g., Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 & n.7 (5th Cir. 1989)(criticizing "formulaic application of the public forum doctrine" and citing commentators' warnings that "rigid application of public forum analysis threatens to obscure important first amendment issues").

[7] *E.g.*, L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Post, "Between Governance and Management: the History and Theory of the Public Forum," 34 U.C.L.A. L.Rev. 1713, 1715 (1987); Stone, "Content-Neutral Restrictions," 54 U. Chi. L.Rev. 46, 93-94 (1987); Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L.Rev. 1, 46-49 (1986); Dienes, "The Trashing of the Public Forum: Problems in First Amendment Analysis," 55 Geo. Wash. L.Rev. 109 (1986); Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication," 70 Va. L.Rev. 1219, 1220-24 (1984).

*Perry* test.

Current public forum doctrine is a relatively recent innovation. Prior to 1970, the phrase "public forum" had appeared in only two opinions of this Court, and it was used only seventeen times in the 1970s.[8] In its present version, therefore, public forum doctrine is largely a phenomenon of the 1980s.

Given the fact that public forum doctrine is often invoked today to justify restrictions on speech, it is useful to remember that the doctrine originated in an effort to increase the constitutional protection for free expression.[9] In a famous dictum in *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), Justice Roberts spoke of the special historic role of streets and parks as forums for public debate. His purpose, however, was not to indicate that freedom of speech was less important at other locations. Rather, he referred to the special status of streets and parks only to rebut the notion -- then arguable but now clearly defunct -- that the government has unrestricted authority as a landowner to control speech on its own property.[10]

Regulation of speech in public places once again became an important issue in the 1960s and early 1970s. In a series of cases, the Court attempted to define the contours of government regulation of speech on public

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[8] *See* Farber & Nowak, *supra* note 7, at 1221-22.

[9] Justice Marshall noted this inconsistency between the origins of the doctrine and its current use in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 147-48 (1981)(Marshall, J., dissenting).

[10] *See* Post, *supra* note 7, at 1721-24. Professor Kalven emphasized this aspect of the Roberts dictum in his classic article, "The Concept of the Public Forum: *Cox v. Louisiana*," 1965 Sup.Ct. Rev. 1.



property.[11] Although these cases remain useful sources of guidance, it was only in the early 1980s that a test crystallized in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37. Thus, the *Perry* test is by no means a long-standing pillar of the law.

*Perry* divides government property into three categories, each with its own detailed set of First Amendment rules. In a traditional public forum, the government "may not prohibit all communicative activity," and can only enforce content exclusions based on compelling state interests. *Perry* also recognizes two other forum categories. In a designated public forum, where the state has voluntarily allowed public communication, the same rules apply as in the traditional public forum, except that the government retains the power to close a designated forum completely. The final category, which includes most government property, consists of nonpublic forums. In this residual category, the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 45-46.

As one commentator has observed, neither *Perry* nor later cases "articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories."[12] The language of the First Amendment does not contain even the slightest hint of this tripartite scheme. Nor does the *Perry* opinion refer to any evidence of original intent that might serve to explain its

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[11] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

[12] Post, *supra* note 7, at 1715-16 (footnote omitted).

rigid conceptual framework.

On its face, the *Perry* analysis seems only distantly related to the purposes of the First Amendment. Special protection is given to speech on property that "has been traditionally open to the public for expressive activity." *Id.* at 45. But why should newer kinds of public spaces automatically be deemed less open to First Amendment activity than older varieties? The fact that a certain kind of government property has been used for expressive purposes for many years is undoubtedly relevant. Yet, unless the First Amendment is to be reduced to a branch of the doctrine of adverse possession, such past history cannot be decisive. As Dean Bollinger has said of the public forum doctrine:

> [N]one of this really provides us with an intelligible and acceptable solution to how much public property must be subject to the public forum rules, given the prior decision to make streets and parks conform to those rules. History is a rational reason only to the extent that one can give some other reason why what has or has not been should matter. By itself it is meaningless, and the truth is that we do not rely on it consistently.[13]

It is equally unclear why the government's decision to open property for expressive uses should work a radical transformation in the test applied to that property. The perverse result is that if the government is wholly indifferent or hostile to free expression, it has the benefit of reduced constitutional scrutiny,[14] but it loses that

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[13] Bollinger, "Commentaries: The Tolerant Society: A Response to Critics," 90 Colum. L.Rev. 979, 997 (1990).

[14] *See Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817, 831 (9th Cir. 1991)(Norris, J., dissenting)(*en banc*).



benefit if it makes any affirmative efforts to promote free expression.

Because the *Perry* Court justified its test solely by reference to previous cases, *Perry* is best understood as an effort to synthesize the Court's prior holdings. That synthesis has not, however stood the test of time. To the contrary, later cases have substantially undermined the *Perry* test in three regards.

First, *Perry* no longer governs a broad range of First Amendment issues. This Court has increasingly applied a single standard in assessing the validity of time, place and manner regulations.[15] And *Perry* itself requires strict scrutiny of viewpoint-based regulations even in nonpublic forums. 460 U.S. at 46. Thus, at best, the *Perry* categories only remain relevant for judging government regulations that are content-based but viewpoint-neutral.

Second, the middle category of designated public forums has virtually evaporated. According to the *Kokinda* plurality, a designated forum exists only if the government has "expressly dedicated" the property to speech activity, 110 S.Ct. at 3119, and is not created merely because the government has permitted speech activities to take place on its property, *id.* at 3121. Furthermore, even if the government property "has been dedicated to some First Amendment uses . . . regulation of the reserved non-public uses would still require application of the reasonableness test." *Id.* *Kokinda* thus reinforces the scholarly view that the designated public forum referred to in *Perry* has little practical significance,[16] leaving

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[15] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984)(general test for content-neutral regulations "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions" in public forum).

[16] *See* Post, *supra* note 7, at 1756-57.

only two of the original three categories intact.

Third, according to the *Perry* test, the defining characteristic of the traditional forum is that "[i]n these quintessential public forums, the government may not prohibit all communicative activity." 460 U.S. at 45. More recently, however, this Court has observed that even in a nonpublic forum, "an absolute prohibition on speech" is impermissible. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). Thus, what was supposed to be the defining trait of the traditional forum -- the government's inability to prohibit expressive use of the property -- turns out to apply to the other categories as well.

In short, a mere decade after *Perry*, its analytic scheme lies in tatters. It can and should be reconsidered.

## II. THE *PERRY* TEST HAS ONLY SERVED TO CONFUSE FIRST AMENDMENT ANALYSIS

*Kokinda* illustrates the extent to which public forum doctrine has confused First Amendment analysis.[17] Eight

[17] As Professor Tribe has observed, "many recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification." L. Tribe, *supra* note 7, at 987. For example, in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, the issue was whether nonprofit organizations could be prosecuted for placing pamphlets in the letter boxes of private homes. A letter box might be regarded as a public forum because it is a traditional means for the public communication of stamped letters, or as a nonpublic forum because the government has reserved it for the delivery of stamped mail. The majority's ultimate resolution of the case was to say that mailboxes could be reserved for stamped letters because they were not public forums; the reason they weren't public forums was that the government had re-
(continued...)



Justices reached the issue of whether a post office sidewalk was a public forum. They split evenly on this recondite issue -- a clear indication of the practical unworkability of the *Perry* approach. More importantly, despite the attention given in each of the opinions to this issue, public forum analysis was in fact irrelevant to the ultimate position taken by any member of the Court. The plurality viewed the regulation as content-neutral, 110 S. Ct. at 3124. Justice Kennedy concluded that the regulation was valid even if the sidewalk was a traditional public forum. *Id.* at 3125-26. The dissenters, meanwhile, argued that the post office regulation was unreasonable even if the sidewalk was not a public forum. *Id.* at 3137. Thus, the proper classification of the sidewalk was quite irrelevant to the analysis of any member of the Court. It served only as a distraction and source of confusion.

In other cases, public forum analysis has led to a series of seemingly inexplicable distinctions. Perhaps there is a defensible distinction between leafletting on the steps of the Supreme Court and on the adjoining sidewalk,[18] or between an educational institution's restrictions on access to unused classrooms and to faculty mailboxes,[19] but any distinctions that exist are certainly more contextual and subtle than public forum analysis would indicate.

The present case further demonstrates the analytical inadequacy of public forum doctrine. It is clear that airport terminals are like downtown sidewalks in many re-

[17] (...continued)
served them for stamped letters. The analysis is a perfect exercise in circularity, which is why Justice White's concurrence, *id.* at 142, described the public forum analysis as "bootless."

[18] *See United States v. Grace*, 461 U.S. 171, 178-84 (1983).

[1] *Compare Widmar v. Vincent*, 454 U.S. 263 (1981), *with Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37.

spects and unlike them in other respects. But a mere list of factual similarities and differences cannot resolve the First Amendment issue. Rather, what is needed is a sensible appraisal of the *significance* of these factual differences in light of the speech interests involved.

Our objection to public forum analysis is not that it invariably yields wrong results (although it may sometimes do so), but that it distracts attention from the values at stake in a given case. Too often, the effect of public forum analysis is that, "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting). Although *amici* do not advocate *ad hoc* balancing, the point remains that the current analysis obscures more than it illuminates.

## III. ANY RESTRICTIONS ON SPEECH SHOULD BE JUDGED BY THE NATURE OF THE GOVERNMENT'S INTEREST AND NOT BY THE ARTIFICIAL CATEGORIZATION OF ITS PROPERTY

As previously noted, the distinctive legal standard created by *Perry* is only dispositive when dealing with regulations that restrict the content of speech in a viewpoint neutral way.[20] Under *Perry*, such regulations are typically upheld in nonpublic forums and invalidated in traditional or designated public forums.

To the extent that the *Perry* taxonomy is meant to reflect the government's interest in the effective functioning of its offices and facilities, *amici* have no quarrel. However, contrary to the approach adopted in *Perry*, *amici* do not believe that this government interest is preordained by history or by the government's intention to open its property for expressive activity. The flaw in *Perry* is that its formalistic test discourages rather than encourages a serious examination of the government's regulatory interest.

There is a much simpler and far more straightforward approach. If content-based prohibitions are ever permissible,[21] the government must be able to demonstrate that "the characteristic nature and function of the particular forum," *Heffron*, 452 U.S. at 651, are "basically incompatible" with the speech the government seeks to ban, *Grayned*, 408 U.S. at 116. A special restriction on picketing near schools must be justified by the needs of schools; a ban on faculty mailbox use must have something to do with other demands on the mail system; a ban on airport solicitation must have some connection with the special characteristics of the airport terminal. Moreover, the government's justification must be a substantial one given the preferred status of free expression in our constitutional scheme. *See Schneider v. New Jersey*, 308 U.S. 147 (1939)(ban on handbilling not justified by government's interest in curbing litter).

The shift in emphasis from form to function more faithfully reflects core First Amendment principles. In addition, a functional test that looks to whether the particular speech is basically incompatible with other purposes for which the property is designed, would clarify First Amendment standards. It would not, however, require a radical break with the results in prior cases. In

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[20] *See* p.9, *supra*.

[21] For a cogent argument that content-based prohibitions of speech are *per se* invalid under the First Amendment, *see* Justice Kennedy's concurring opinion in *Simon & Schuster v. Members of the New York State Crime Victims Board*, 60 U.S.L.W. at 4034-35.

most public forum cases, the Court has not been content with an application of *Perry*, but has also made some attempt to consider whether a restriction on speech was linked to a particular government interest. For example, the Court has decided a series of public school cases. The "forums" involved have ranged from the sidewalk outside the school[22] to a school assembly.[23] Despite the diversity of these settings, including both traditional forums and nonpublic forums, the decisive factor in the cases has always been whether the speech in question interfered with the educational mission of the public schools.[24]

Like the *Perry* approach, a functional test also provides special leeway for speech on streets, sidewalks, and parks. It is difficult indeed to imagine how the identity of a speaker, or the subject matter of the speech, would have any connection at all with street maintenance, traffic flow, or any other government interest relating to streets. Thus, under a functional test, strict content neutrality would remain the rule in these settings.

Although a functional test might produce the same results as *Perry* in many situations, it nonetheless offers several advantages. First, a functional test is much simpler. It replaces a three-part scheme with a unified test. Second, rather than requiring courts to grapple with an esoteric classification scheme, it directs their attention to the practical reasons for a government regulation. The result should be a clearer and more consistent body of precedent. Third, a functional test gives both speakers and government authority a much more understandable guideline. The difference between a designated or limited public forum and a nonpublic forum is not easy to discern even for the members of this Court, let alone to explain to an administrator or a protester. A school's legitimate interest in preventing interference with its educational mission is something that everyone can understand, even if there is disagreement about when that interference occurs.

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[22] *See Grayned v. City of Rockford*, 408 U.S. 104; *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[23] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[24] *See* Farber & Nowak, *supra* note 7, at 1245-53.



One of the subtle harms caused by the *Perry* approach is that it actually discourages administrators from adopting clear regulations about access to government forums. Having adopted a rule that establishes a clear right to access, the government may then be faced with a claim that it has established a designated or limited public forum. If it decides the access question on an *ad hoc* basis, it avoids this risk. In contrast, a functional test encourages the implementation of clear regulations. Without a clear statement of what speech is allowed or forbidden, the government would be hard-pressed to show that a restriction is closely tied to any specific government interest.

A functional test would not require the government to throw open every bulletin board, classroom, and office building to the general public. What it would require -- and what this Court *should* require of the government if it permits content-based regulations at all -- is a clear articulation of the government interest in restricting speech at a particular location. That commonsense inquiry has been largely observed by the artificial categories imposed by the *Perry* test.

## IV. DEFENDANT'S BAN ON SOLICITATION CANNOT SURVIVE FIRST AMENDMENT SCRUTINY UNDER *PERRY* OR ANY OTHER APPLICABLE TEST

In our view, defendant's ban on solicitation is properly viewed as a restriction on the subject matter of

speech -- the topic being the desirability of a charitable donation. This ban has no relationship with any peculiar feature of the airport. Busy travelers, like busy pedestrians in other locations, may prefer not to be distracted by such requests. But there is nothing about an airport that makes the subject of charitable donations in general -- or religious donations in particular -- an inappropriate subject for discussion. The regulation therefore fails a functional test because there is no connection at all between the regulation and the special needs of the particular government operation.

The solicitation regulation is equally invalid even if it is deemed content neutral. In *Ward v. Rock Against Racism*, 491 U.S. at 800, the Court made it clear that content-neutral regulations of speech must be "narrowly tailored" and cannot be "substantially broader than necessary to achieve the government's interest." As Judge Oakes pointed out in his dissent below, numerous alternatives exist to the outright ban adopted by defendant, such as badges for solicitors, limitations on the number of solicitors, or restrictions on the locations of solicitation within the terminal. 925 F.2d at 586.[25] Given that essentially the same test applies to content-neutral regulations on all government property, a ruling upholding defendant's ban on solicitation would open the door to similar regulations in any crowded public place.

Finally, defendant's ban on solicitation is clearly invalid even under *Perry*. As the court below acknowledged, every other circuit to consider the issue has concluded that an airport terminal is a public forum. *Id.* at 580. Defendant has not even begun to make a case for a ban on leafletting and solicitation on a typical sidewalk or other traditional public forum. Indeed, defendant's

[25] *See also Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Fernandes v. Limmer*, 663 F.2d 619, 633-35 (5th Cir. 1982).



regulations cannot withstand scrutiny under the *Perry* test for nonpublic forums. The essence of that test is that the government can reserve a nonpublic forum for its "intended purpose." The intended purpose of a terminal is to serve the manifold needs of the traveling public. Only by fiat can those needs can be defined to include the provision of items as diverse as haircuts and artistic displays, 925 F.2d at 578, but *not* a traveler's possible desire to make a charitable contribution or to obtain enlightenment from religious or political literature.

## CONCLUSION

For the reasons stated herein, the judgment below should be reversed insofar as it upheld defendant's ban on solicitation.

Respectfully submitted,

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